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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1526

HENRY COULTER, ET AL.,
Petitioners,

vs.

ARCHIE MELADY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT, STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT, STATE OF TEXAS

TO SAID HONORABLE COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Texas which denied relief sought on April 14, 1973.

OPINION BELOW

The order granting the defendant's motion for instructed verdict (S.F. p. 279) is set forth in a separate appendix. The opinion of the Court of Civil Appeals is reported in 489 S. W. 2d 156. It is set forth in a separate appendix, as well as the order denying rehearing, dated December 12, 1972, and the denial of Writ of Error by the State Supreme Court dated March 14, 1973.

JURISDICTION

The judgment of the Court of Civil Appeals, Sixth Supreme Judicial District was rendered on November 14,

1972, and rehearing denied on December 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTIONS RAISED

1. Is Art. 2.47 of the Texas Family Code in violation of the Fourteenth Amendment to the Constitution of the United States, Section One?

2. Did the Trial Judge violate the Seventh Amendment to the Constitution of the United States in denying the Petitioners a trial by jury, and citing Art. 2.47 of the Texas Family Code as his authority?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV:

> Section 1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Art. 2.47, Texas Family Code:

> Death of Party to Voidable Marriage. "A marriage voidable under this sub-chapter is not subject to chal-

lenge in any proceeding instituted after death of either party." Vernon's Texas Code Annotated Family Code, page 31.

STATEMENT

This is a suit by the brothers and sisters of the Deceased to set aside an attempted marriage contract in order that they may inherit under the laws of descent and distribution. Under Texas law, in the absence of a valid will the husband inherits all the personal property and one-half of the real property. The estate was valued at $200,000.00.

The Deceased had terminal cancer and was so diagnosed in July, 1970; afterward while this Deceased was in a toxic state the Respondent threatened, over-reached and persuaded the Deceased to appear before a Justice of the Peace on July 16, 1970, where Witness Moulder testified that the Deceased did not utter a word but stood mute before the Justice of the Peace, then sat with her head in her hands while the Justice of the Peace "read something from a book".

The doctors who treated the Deceased testified as to her condition two days before the purported marriage:

"Q. Tell the court and the jury how she came to your clinic? (S.F. 156, lines 8-14)

"A. They brought her in by ambulance on July 14th, and carried her back home by ambulance. I do not know how she came on that day, I was quite busy, and I just signed the forms that—and went on with the next patient.

"Q. I understand. Now then, did you make any recommendation to her as to what she should or should not do on this particular occasion?

"A. On the 14th, I begged her to let's go to the hospital where I could do more for her. She had had radiation a few weeks before that and was getting an extreme effect from the radiation, plus the fact that she was awfully toxic from her bowel situation, and needed to be in the hospital where she could have daily glucose and minerals and vitamins and keep her fluid level up.

* * *

"Q. Did it become necessary to increase the intake of sedatives as time wore along from February on until the time of her death?

"A. Right. (S.F. 158, lines 15-18)

"Q. Doctor, just let me give you this hypothetical situation: let's assume that you have a person in this condition that you have just described that Mrs. Melady or Mrs. Anderson was experiencing, I ask you whether or not in your opinion you felt like that she had the capacity to know the object of her bounty and the nature and the extent of what her acts might consist of?

"A. Only in part, I would say; simply because if you are tremendously disturbed emotionally, suffering pain (S.F. 159, lines 16-25) and so toxic that you feel the extreme effect of the toxemia—that's the absorption of the dead tissue where she had had radiation, the toxemia from the malignant tissue, all those things—why, it was wasting the body that you could see out here, and so I would say naturally the brain likewise, tissues of the brain were suffering the same situation. This total picture would impair your judgment as well as possibly to make you less alert as to what you were doing; just exactly borderline or how much, you cannot say for sure." (S.F. 160, lines 1-11)

Witness Mrs. Humphries testified:

"Q. Tell the court and jury what she said in that regard?

"A. Well, she said really she wasn't married to the man because she never said 'I do' and she did not take and hold hands with him, didn't join hands.

"Q. Did she say anything else about that?

"A. Well,—

"Q. I will ask you whether or not she expressed some concern over whether she was married or whether she wasn't married? I will ask that question.

"A. Said she really wasn't.

"Q. Did she try to explain to you why she went through this particular ceremony if she did?

"A. Yes, she went through it for fear of what would happen to her.

"Q. Did she express some fear as to what might happen to her if she didn't?

"A. Yes. He had threatened to burn the house down on her if she didn't. And that's why she went through all this procedure.

"Q. Did she say anything about whether or not he had made any other threats?

"A. Yes, she told me that.

"Q. Go ahead with what other threats, if there were any, that she said were made by Archie.

"A. Well, he threatened to—she said that he told her he would burn the house down and her in it, she wasn't able to get out; and she said that she was afraid of his jumping onto her and beating her up, in the condition she was in.

"Q. Was anything mentioned about Archie having any conversation with her about standing mute before the Justice of the Peace?

"A. Yes, he raised heck about it.

"Q. Said what?

"A. He raised heck about it. He talked ugly to her about it.

"Q. Did she use the word 'heck' or some other word?

"A. Well, another word, but I wouldn't say that." (S.F. 79-82, lines 24-9)

Witness Moulder testified:

"Q. Did Mrs. Melady answer any of the questions propounded to her by the Justice of the Peace?

"A. No, sir.

"Q. Did you ever hear her say 'I do'?

"A. No, sir.

"Q. Did you ever hear her say 'I accept this man to be my lawful wedded husband'?

"A. No sir.

"Q. Or any words to that effect?

"A. No, sir.

"Q. What was the next thing that transpired.

"A. I had to help her up, and we went back home.

"Q. What did you do when you got back home?

"A. I had to get some help to carry her in the house, she couldn't even walk.

"Q. Who helped you carry her in the house?

"A. My step son-in-law." (S.F. 48, lines 1-17)

Although a fact issue was present, the trial court instructed jury to return a direct verdict against the petitioners.

FEDERAL QUESTIONS FIRST RAISED IN TRIAL COURT

1. The Trial Court was interrogating Petitioner's counsel regarding the interpretation of Art. 2.47 of the Family Code, the following colloquy:

"MR. ANDERSON: That is correct, Judge. And I would like to make this one other observation, then I will sit down, if 2.47—you wouldn't have to look at that long because if that was the law, if that was permitted to be the law and if it was followed, there is no question in my mind that it is unconstitutional because if this was valid then you would be denying the parties due process of the law under the Fourteenth Amendment. You would be denying him of his property without a hearing in court, he never would have a day in court.

THE COURT: Be denying who?

MR. ANDERSON: A man of his property. The heirs of Leola Melady; you would be denying them of their property without due process of law, and they would not have been given their day in court.

THE COURT: Thank you, Mr. Anderson. Mr. Grant, I will hear your motion." (S.F. 178, lines 1-13)

2. Motion for New Trial, in Assignment of Error No. 10 (See Tr. 62)

3. Assignments of Error Three (Tr. 60); Five (Tr. 60); Nine (Tr. 62); Twelve (Tr. 63); Thirteen (Tr. 63) Same being Point No. 4 in Petitioner's Brief to Appellate Courts.

4. Assignments of Error Nos. Four (Tr. 60); Five (Tr. 60); Six (Tr. 60); Seven (Tr. 60); Nine (Tr. 62); Ten (Tr. 62); Eleven (Tr. 62); Twelve (Tr. 63); Fifteen (Tr. 64) Same being Point No. 8 in Petitioner's brief to Appellate Court.

The Trial Court, Court of Civil Appeals and Supreme Court violated the Seventh and Fourteenth Amendments of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

1. Notwithstanding the Appeals Court holding, the above quoted testimony clearly shows that a fact issue was established as to whether a valid marriage was contracted, therefore the Petitioners have been denied their right to trial by jury in conflict with *R. B. Pittman* v. *Gulf, Colorado & Santa Fe Railway Company,* C. A. Eastland, 1960, Walter, J., 338 S.W. 2d 774 (n.r.e.), Cert. den. 82 S. Ct. 49, 368 U.S. 828, 7 L. Ed. 2d 31.

2. Section 2.47 is too vague, uncertain, unreasonable and capricious when considered in connection with the explanation made in the same rules as to what is meant by it, or the reason or purpose for such statute. *Connally* v. *General Construction Company,* 269 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed. 322.

3. The petitioners have been denied their day in court and a trial by jury and have therefore been denied their property without due process of law, and such ruling is in conflict with decisions rendered earlier in *Mullane* v. *Central Hanover Tr. Co.,* 94 L. Ed. at 875; *Armstrong* v. *Manso,* 14 L. Ed. 2d at 62, 66.

Although a jury was selected and heard the evidence and the fact issues involved, the trial court directed a verdict against the petitioners thereby denying the petitioners a meaningful opportunity to be heard at a meaningful time and manner by the jury which is in direct conflict with *Windsor* v. *McVeigh,* 23 L. Ed. 914 (1876) and this resulted in the taking of their property without due process.

ARGUMENT

In essence the Appellate Courts held that consent to the marriage was shown as a matter of law, disregarding the threats and force that were shown to exist. (S.F. 84, lines 8-9; 81, lines 19-25; 82, lines 1-22)

In substance the Appellate Courts are not looking behind the marriage license, and are saying that a boilermaker can obtain a brain surgeon's license through devious means and that he should be allowed to practice brain surgery because he has the proper license.

The Appellate Court skims over the unconstitutionality of Art. 2.47 of the Texas Family Code and simply say, "At the effective date of the Code Section the Appellants had nothing more than an expectancy under the law of descent and distribution. * * *" citing Dallas v. Trammel, 101 S.W. 2d 1009, which has to do with the City of Dallas and the State Legislature reducing the amount of the firemen's pension (police powers). Admitted this may be done, but the enactment of Art. 2.47 of the Family Code is even in violation of the Texas Constitution. See Vernon's Constitution of the State of Texas, Art. 3, §56 at page 749, which states:

> "Section 56: The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special laws authorizing:
>
> * * * Changing the law of descent and distribution."

The Appellate opinion unknowingly recognizes that Art. 2.47 of the Texas Family Code changed the laws of descent and very brilliantly states that the petitioners only had an expectancy at the time Art. 2.47 became effective. True, but at the moment of death they had a Constitutional vested interest by virtue of the Federal and State Constitutions.

The petitioners only had an expectancy during the life of the deceased regardless of the constitutionality of Art. 2.47.

If Art. 2.47 of the Family Code is permitted to remain in the Statutes, it is conceivable that a wife-beater and wife-terrorist could force a woman with $1,000,000.00 to marry him and after the Justice of the Peace "read something from a book" she might drop dead and he would be richer by $1,000,000.00 to the deprivation of her lawful heirs.

The trial court in his order granting the motion for instructed verdict (See appendix) recognizes the absurdity of Art. 2.47 and in substance says, a rascal may commit all the fraud, fear, and coercion he desires and the Fourteenth Amendment be damned.

For the foregoing reasons it is submitted that the Petition for Certiorari should be granted to review the judgment of the Court of Civil Appeals, Sixth Supreme Judicial District of the State of Texas, which decision was allowed to stand by the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was this the 24th day of April placed in the United States Mail, postage prepaid, to Mr. Ben Z. Grant, Post Office Box 299, Marshall, Texas, Attorney of Record for Respondents.

.....

Of Counsel

APPENDIX I

Order Granting Defendant's Motion for Instructed Verdict

THE COURT: I am going to grant the defendant's motion for an instructed verdict. I have carefully considered this matter; if this was solely a matter of equity, my decision might be different. On the other hand, I feel that it is clear under the law that the court should exercise its judgment at this time and declare as a matter of law that the defendant is entitled to a judgment. I have carefully considered the provisions of the Family Code, Chapter 2, under "Validity of Marriage" Sec. 2.02, which provides, "Except as otherwise provided by this chapter, the validity of a marriage is not affected by any fraud, mistake, or illegality that occurred in obtaining the marriage license." Sec. 2.03; "The validity of a marriage is not affected by any lack of authority of the person conducting the marriage ceremony if there was a reasonable appearance of authority by that person and at least one party to the marriage participated in the ceremony in good faith and that party treats the marriage as valid."

APPENDIX II

Henry COULTER, et al., Appellants,

v.

Archie MELADY et al., Appellees.

No. 8115.

Court of Civil Appeals of Texas,
Texarkana.

Nov. 14, 1972.

Rehearing Denied Dec. 12, 1972.

Five days after death of purported wife, various of her relatives instituted suit to annul marriage and for ancillary relief. The District Court, Harrison County, John Furrh, J., entered judgment on instructed verdict in favor of defendants, and plaintiffs appealed. The Court of Civil Appeals, Chadick, C. J., held, inter alia, that purported wife's knowing compliance with Code requirements with respect to medical examination, applying for marriage license, and participating in a marriage ceremony conducted by an authorized person showed her consent to the marriage as a matter of law, regardless of her alleged failure to audibly respond to questions during the ceremony; and that statute providing that voidable marriage is not subject to challenge in any proceeding instituted after the death of either party, as applied to bar annulment on alleged grounds of mental incompetency of wife and threats, force and fraud on the part of the husband, did not violate constitutional guaranties of jury trial and against deprivation of property except by due course of law, since statute became effective prior to marriage and later death of wife and since plaintiffs'

claim under the law of descent and distribution arose only as a result of and at the time of death.

Affirmed.

Ray, J., did not participate.

1. Marriage (Key) 18

Though want of consent to marriage, standing alone, is not listed in the Family Code as a cause that renders a marriage void or voidable, free consent and agreement of the parties is essential to a valid ceremonial marriage. V.T.C.A., Family Code, §§ 2.21, 2.22, 2.41-2.46.

2. Marriage (Key) 18

Purported wife's knowing compliance with Code requirements with respect to medical examination, applying for marriage license, and participating in a marriage ceremony conducted by an authorized person showed her consent to the marriage as a matter of law, regardless of her alleged failure to audibly respond to questions during the ceremony.

3. Marriage (Key) 58(1)

Marriage voluntarily consented to by the parties may be annulled only when it is judicially ascertained to be void or voidable for a reason listed in the statutes. V.T.C.A., Family Code, §§ 2.21, 2.22, 2.41-2.46.

4. Marriage (Key) 28

Official conducting marriage ceremony is not required to elicit particular or specific information or answers from a party to the marriage, nor are participants required to speak or respond in a given way. V.T.C.A., Family Code, § 2.01.

5. Marriage (Key) 60

Where suit by relatives of purported wife seeking annulment on alleged grounds of mental incompetency of wife and threats, force and fraud on the part of the husband was not instituted until five days after the death of the wife, the annulment action was foreclosed by statute providing that voidable marriage is not subject to challenge instituted after the death of either party. V.T.C.A., Family Code, §§ 2.44, 2.45, 2.47.

6. Constitutional Law (Key) 105

Vested rights, including matured causes of action or defense, are protected by constitutional provision that no citizen shall be deprived of life, liberty, property or immunities, or disfranchised, except by the due course of law, but a mere expectancy is not protected. Vernon's Ann.St. Const. art. 1, § 19.

7. Constitutional Law (Key) 106
Marriage (Key) 60

If an interest in the estate of purported wife had vested in her relatives before the effective date of statute providing that voidable marriage is not subject to challenge instituted after the death of either party, such statute would have been void as to such relatives, but since statute became effective before the marriage and later death of such wife, and since relatives' claim under the law of descent and distribution arose only at the time of her death, statute was constitutionally valid and applicable to annulment suit instituted five days after death of wife. V.T.C.A., Family Code, § 2.47; Vernon's Ann.St.Const. art. 1, § 19.

8. Descent and Distribution (Key) 68

Any claim of relatives of decedent under the law of descent and distribution arose as a result of and at the time of decedent's death, and before then relatives had nothing more than an expectancy.

9. Jury (Key) 31(3)

Where no jury issue was developed in suit by relatives to annul marriage of purported wife after her death, constitutional guaranty of right of trial by jury was not violated by basing judgment against relatives on statute providing that voidable marriage is not subject to challenge instituted after the death of either party. V.T.C.A., Family Code, § 2.47; Vernon's Ann.St.Const. art. 1, § 15.

Paul W. Anderson, Sam B. Hall, Jr., Hall & Huffman, Marshall, L. F. Burke, Longview, for appellants.

Ben Z. Grant, Kirkpatrick, Grant, Dennis & Baxter, Marshall, for appellees.

CHADICK, Chief Justice.

Archie Gordon Melady and Mrs. Leola Anderson were ostensibly united in marriage on July 16, 1970, in a marriage ceremony solemnized before a Justice of the Peace of Harrison County, Texas. As the parties entered the ceremony, both were single, one male and the other female, and both had complied with all legal prerequisites to a valid marriage so far as premarital tests, obtaining a marriage license, and presenting themselves at the ceremony are concerned. At conclusion of the ceremony the officiating officer pronounced the parties husband and wife and promptly made a return showing performance of the marriage rites and the return was duly recorded as a public

document by the County Clerk. Of moment in this appeal is controverted testimony that Mrs. Anderson was mute during the ceremony and gave no audible response to questions directed to her by the officiating Justice of the Peace, from which it might be inferred that she did not consent to marriage.

Mrs. Leola Melady died testate on October 11, 1970. Five days later, October 16, 1970, suit was filed by one of Mrs. Melady's brothers and a nephew in a District Court of Harrison County, to annul Mrs. Melady's marriage to Archie Melady and for ancillary relief. An amended petition was subsequently filed in which three of Mrs. Melady's brothers, a sister, and the nephew are named as plaintiffs, and Archie Melady, Ed Melady, and the Marshall National Bank were named as defendants; the relief sought was the same as prayed originally. When the parties concluded presentation of evidence and rested, the trial judge instructed a jury verdict in favor of the defendants and entered judgment that plaintiffs take nothing, decreeing therein that: "* * * the marriage between Archie Melady and Leola Anderson Melady is hereby declared to be a valid marriage, * * *," and taxed costs against the plaintiffs.

The decisive points of error in the appeal are:

"Point No. 7. The trial court erred in holding as a matter of law that the defendants were entitled to an instructed verdict and judgment.

"Point No. 8. The trial court erred in rendering judgment for the defendants based upon the unconstitutional Section 2.47 of the Family Code."

Basically, the appellants (plaintiffs in the trial court), contend (1) that the controverted testimony mentioned in the first paragraph raised a fact issue for jury deter-

mination respecting Mrs. Melady's consent to marriage, and (2) that the Texas Family Code Ann. Sec. 2.47, V.T.C.A., (1970) is unconstitutional insofar as it denied the appellants a right to have the Anderson-Melady relationship declared a void marriage because Mrs. Anderson did not consent to marriage with Archie Melady. Determination of the quoted points of error disposes of this appeal and renders discussion of the preceding six points unnecessary.

The Texas Family Code Annotated became effective January 1, 1970; (Sections alluded to in this opinion are reproduced in the appendix). The enactment statutorily regularizes the marriage relationship in Texas. Public policy that favors the relationship and preserves and upholds the validity of marriage is articulated therein. Prohibitions, misconduct and circumstances that make marriages either void or voidable are catalogued. The parties authorized to bring proceeding to annul voidable marriages are specified. Void marriages are those prohibited by Texas Family Code Ann. Secs. 2.21 and 2.22 (1970). Voidable marriages are those that may be annulled under the provisions of Texas Family Code Ann. Secs. 2.41, 2.42, 2.43, 2.44, 2.45 and 2.46.

[1-4] Want of consent to marriage, standing alone, is not listed in the Family Code as a cause that renders a marriage either void or voidable. Nevertheless this court is persuaded that free consent and agreement of the parties is essential to a valid ceremonial marriage. 52 Am. Jur.2d Marriage, Sec. 27; 55 C.J.S. Marriage § 18; 38 Tex. Jur.2d Marriage, Sec. 8. In this instance, however, consent is shown as a matter of law. The structure of the Family Code, the detailed and specific rules prescribed therein to be followed in establishing the marriage relationship, compels a party to knowingly initiate and perform the legal prerequisites to a ceremonial marriage. Such parties

are required by the Code to undergo medical examination, unless exempt by court order, to apply for a marriage license, and to participate in a marriage ceremony conducted by an authorized person. A party's knowing compliance with the Code's requirements, as Mrs. Anderson complied in this instance, evidences voluntary consent to marriage and by force of law is conclusive that such party voluntarily consented. And such marriage may be annulled only when it is judicially ascertained to be void or voidable for a reason listed in the statutes. Tex.Family Code Ann. Sec. 2.01 (1970). The Code prescribes no set form for a marriage ceremony or the procedure therein. The official conducting the ceremony is not required to elicit particular or specific information or answers from a party to the marriage, nor are participants required to speak or respond in a given way. Mrs. Anderson's failure to audibly respond to questions during the ceremony does not raise a fact issue as to her consent to the marriage, as her prior action shows consent as a matter of law. The appellants' seventh point of error is overruled.

[5] The trial petition averred that Mrs. Melady was possessed of a substantial separate estate at the time of her death (the evidence showing the net value at approximately $200,000.00); that Mrs. Melady did not make a valid will; and that by virtue of kinship the plaintiffs had an interest in such estate under the law of descent and distribution. In addition to want of consent, which has been found to be without merit, the trial pleadings alleged as grounds for annulment Mrs. Melady's mental incompetency and that Archie Melady's threats, force and fraud induced Mrs. Melady to enter into the marriage relationship. Reference to excerpts from the Code copied in the margin shows that the Family Code authorizes annulment upon grounds substantially similar to those al-

leged. However, Code Section 2.47 bars prosecution of a suit for annulment upon the grounds alleged in the appellants' pleading if instituted after the death of a party to the marriage relationship. In the forepart of the opinion it was stated that this suit was not instituted until five days after the death of Mrs. Melady, and therefore, such annulment action was foreclosed by the mentioned section at the time instituted.

[6, 7] The appellants seek to sidestep Code Section 2.47 on the ground that it is repugnant to the Texas Constitution, art. I, Sec. 15 and Sec. 19, Vernon's Ann.St. The pertinent provisions of the sections referred to are copied in the margin. Vested rights, including matured causes of action or defense are protected by Tex.Const. art. I, Sec. 19. Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (Tex.Sup.1916); International & G. N. R. Co. v. Edmundson, 222 S.W. 181 (Tex.Comm'n. App.1920); and 12 Tex.Jur.2d Constitutional Laws, Secs. 115, 116 and 117. If an interest in Mrs. Melady's estate vested in the appellants before the effective date of Code Section 2.47, the section would be void as to the appellants. But under this record, there is nothing to inhibit application of Code Section 2.47 as valid and applicable.

[8] Section 2.47 became effective January 1, 1970. Mrs. Melady died slightly more than ten months later on October 11, 1970. The appellants base their claim and interest in Mrs. Melady's estate on the law of descent and distribution. Any claim under the law of descent and distribution arose as a result and at the time of her death. At the effective date of the Code Section, the appellants had nothing more than an expectancy under the law of descent and distribution, that is, a prospect that Mrs. Melady's estate might pass to and vest in them at the time of her death, if not otherwise disposed of by her. A mere expectancy is not protected by the men-

tioned provisions of the Constitution. Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009 (Comm'n.App.1937, opin. adpt.).

[9] In view of the foregoing discussion, it is apparent that no jury issue was developed in the case, and that Texas Constitution, art. I, Sec. 15 was not violated in basing judgment in this case upon Code Section 2.47.

The appellants' eighth and all other points of error not previously acted upon are overruled and the judgment of the trial court is affirmed.

RAY, J., not participating.

APPENDIX

"Sec. 2.21 *Consanguinity.* (a) A person may not marry: (1) an ancestor or descendent, by blood or adoption; (2) a brother or sister, of the whole or half blood or by adoption; or (3) a parent's brother or sister, of the whole or half blood. (b) A marriage entered into in violation of this section is void.

"Sec. 2.22 *Marriage During Existence of Prior Marriage.* A marriage is void if either party was previously married and the prior marriage is not dissovled. However, the marriage becomes valid when the prior marriage is dissolved if since that time the parties have lived together as husband and wife and represented themselves to others as being married.

"Sec. 2.41. *Underage.* (a) The . . . marriage of a male 16 years of age or older but under 19 years of age, or a female 14 years of age or older but under 18 years of age, without parental consent as provided by Section 1.52 of this code, is voidable and subject to annulment at the discretion of the court on the petition of a next

friend for the benefit of the underage party, or on the petition of the parent or the guardian of the person of the underage party. However, a suit may not be brought under this subsection more than 90 days after the date of the marriage.

(b) In exercising its discretion under this section, the court shall consider all pertinent facts concerning the welfare and best interests of both parties to the marriage, including whether or not the woman is pregnant.

"Sec. 2.42. *Under Influence of Alcohol or Narcotics.* On the suit of a party to a marriage, the marriage is voidable and subject to annulment if: (1) at the time of the marriage the petitioner was under the influence of alcoholic beverages or narcotics and as a result did not have the capacity to consent to the marriage; and (2) the petitioner has not voluntarily cohabited with the other party to the marriage since the effects of the alcoholic beverages or narcotics ended."

"Sec. 2.43. *Impotency.* On the suit of a party to a marriage, the marriage is voidable and subject to annulment if: (1) either party, for physical or mental reasons, was permanently impotent at the time of the marriage; (2) the petitioner did not know of the impotency at the time of the marriage; and (3) the petitioner has not voluntarily cohabited with the other party since learning of the impotency.

"Sec. 2.44. *Fraud, Duress, Force.* On the suit of a party to a marriage, the marriage is voidable and subject to annulment if: (1) the other party uses fraud, duress, or force to induce the petitioner to enter into the marriage; and (2) the petitioner has not voluntarily cohabited with the other party since learning of the fraud or since being released from the duress or force.

"Sec. 2.45. *Mental Incompetency.* (a) On the suit of a party to a marriage, or on the suit of the party's guardian or next friend (if the court finds it to be in his best interest to be represented by a guardian or next friend), the marriage is voidable and subject to annulment if: (1) at the time of the marriage, as a result of a mental disease or defect, the petitioner did not have the mental competency to consent to marriage or to understand the nature of the marriage ceremony; and (2) since the marriage ceremony, the petitioner has not voluntarily cohabited with the other party during any period when the petitioner possessed the mental competency to recognize the marriage relationship.

(b) On the suit of a party to a marriage, the marriage is voidable and subject to annulment if: (1) at the time of the marriage, as a result of a mental disease or defect, the other party did not have the mental competency to consent to marriage or to understand the nature of the marriage ceremony; (2) at the time of the marriage, the petitioner neither knew nor reasonably should have known of the mental disease or defect; and (3) since the petitioner discovered or reasonably should have discovered the mental disease or defect, the petitioner has not voluntarily cohabited with the other party.

"Sec. 2.46. *Concealed Divorce.* (a) On the suit of a party to a marriage, the marriage is voidable and subject to annulment if: (1) the other party was divorced from a third party within the six-month period preceding the day of the marriage ceremony, and the prohibition against marrying again within the six-month period was not waived under Section 3.66 of this code; (2) at the time of the marriage ceremony, the petitioner did not know, and a reasonably prudent person would not have known, of the divorce; and (3) since the petitioner discovered, or a

reasonably prudent person would have discovered, the fact of the divorce, the petitioner has not voluntarily cohabited with the other party.

(b) A suit may not be brought under this section more than one year after the date of the marriage.

"Sec. 2.47. *Death of Party to Voidable Marriage.* A marriage voidable under this subchapter is not subject to challenge in any proceeding instituted after the death of either party.

"Sec. 2.01. *State Policy.* In order to promote the public health and welfare and to provide the necessary records, this code prescribes detailed and specific rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide legitimacy and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless strong reasons exist for holding it void or voidable. Therefore, every marriage entered into in this state is considered valid unless it is expressly made void by this chapter or unless it is expressly made voidable by this chapter and is annulled as provided by this chapter. When two or more marriages of a person to different spouses are alleged, the most recent marriage is presumed to be valid as against each marriage that precedes it until one who asserts the validity of a prior marriage proves its validity.

"Tex.Const. art. I, Sec. 15. The right of trial by jury shall remain inviolate. * * *"

"Sec. 19. No citizen of this State shall be deprived of life, liberty, property, or immunities, or in any manner disfranchised, except by the due course of the law of the land."

APPENDIX III

Order

BE IT REMEMBERED that on Tuesday the 12th day of December A. D. 1972, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana, Texas. Present T. C. Chadick, Chief Justice, Matt Davis, Associate Justice, C. L. Ray, Jr., Associate Justice, and Lonnie E. Jones, Clerk, when the following proceedings, among others, were had, to-wit:

Henry Coulter, et al - - - Appellants	) Appealed from the
No. 72-145:8115	) District Court of
vs.	) Harrison County,
Archie Melady, et al - - - Appellees	) Texas.

THIS CAUSE came on to be heard on Appellants' Motion for Rehearing and the Court having inspected and duly considered said motion is of the opinion that the said motion should be and the same is hereby OVERRULED.

I, LONNIE E. JONES, Clerk of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana hereby certify that the above and foregoing constitutes a correct copy of this Court's order on Appellants' Motion for Rehearing as same appears in the Minutes of Said Court on December 12, 1972.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office at Texarkana this 16th day of April A. D. 1973.

/s/ Lonnie E. Jones, Clerk, Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana

APPENDIX IV

CLERK'S OFFICE-SUPREME COURT

Austin, Texas March 14, 1973

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of COULTER ET AL. v. MELADY ET AL., No. B-3781 was this day refused. No reversible error.

Very truly yours,

Garson R. Jackson, Clerk